

# Learning from the Mistakes of Others: Changing Major League Baseball's Substance Abuse Arbitration Procedure

KEVIN MAHONEY\*

## I. INTRODUCTION

On December 13, 2007, former United States Senator George Mitchell released the 409-page *Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball*, popularly known as the Mitchell Report.<sup>1</sup> This document was the culmination of a nearly twenty-month investigation by the former senator into the use of banned performance-enhancing substances in Major League Baseball (MLB).<sup>2</sup> The report alleged that eighty-nine players, including some of the game's most well-known and respected stars, had used banned performance-enhancing substances in the past.<sup>3</sup>

Senator Mitchell's work was perhaps the most thorough of a long series of investigations and reports regarding the abuse of performance-enhancing substances by Major League Baseball players.<sup>4</sup> What may have been

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\* J.D. Candidate, 2009, The Ohio State University Moritz College of Law. I would like to thank my family, friends, and Nicole for their support throughout these past three years, as well as the staff, authors, and faculty advisors of the *Ohio State Journal on Dispute Resolution* for a great experience as Editor in Chief.

<sup>1</sup> GEORGE J. MITCHELL & DLA PIPER US LLP, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL (Office of the Commissioner of Baseball 2007), available at <http://files.mlb.com/mitchrpt.pdf>. [hereinafter Mitchell Report]; see Duff Wilson & Michael S. Schmidt, *Report Ties Star Players to Baseball's 'Steroids Era'*, N.Y. TIMES, Dec. 14, 2007, at A1.

<sup>2</sup> Wilson & Schmidt, *supra* note 1, at A1.

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Bill Pennington, *Baseball Bars Longtime Star for Steroid Use*, N.Y. TIMES, Aug. 2, 2005, at A1 (detailing the league's decision to ban Baltimore Orioles player Rafael Palmeiro after his testimony before Congress); Jack Curry, *Comments Make Giambi a Target of Investigators*, N.Y. TIMES, May 22, 2007, at D3 (explaining that although New York Yankees player Jason Giambi was one of the only players to publicly admit steroid use at the time of Senator Mitchell's investigations, it was highly unlikely that he would cooperate with Senator Mitchell's investigation). Although he has

regarded even five years ago as a few separate instances of bad behavior has now evolved into the league's most pressing issue, with fans and players alike wondering who will be implicated next.<sup>5</sup> The response of MLB, once criticized for being slow, was reinvigorated by Commissioner Bud Selig.<sup>6</sup> Once accused of ignoring the problem of steroid abuse in the league, MLB's administration requested that Senator Mitchell conduct his investigations and publish the report. Recent investigations and reports have made it clear that baseball's league office is committed to rooting out those who have abused performance-enhancing drugs in the past, even if the offenders were some of the league's most popular stars.<sup>7</sup>

The investigation process is not without its own critics—particularly among players.<sup>8</sup> There have been considerable questions regarding both the method of the league's investigations and possible biases on the part of the

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never tested positive for any banned substance, Barry Bonds' case is arguably the most infamous steroid investigations in baseball's recent history. *See* Murray Chass, *Selig Puts Bonds and Book Under Further Review*, N.Y. TIMES, Mar. 9, 2006, at D1. Bonds was discussed extensively in the Mitchell Report. *See* Mitchell Report, *supra* note 1, at 128–30. Bonds had faced investigation and scrutiny from Major League Baseball even before the publication of the Mitchell Report after he was accused of having abused steroids and other banned substances in “Game of Shadows,” a book written by two San Francisco Chronicle reporters. *See* Bill Nowlin, *A Compelling Summary of the Steroids Scandal*, BOSTON GLOBE, Apr. 11, 2006, at C14; Mitchell Report, *supra* note 1, at SR-17.

<sup>5</sup> Former MLB star Ken Caminiti was quoted in the Mitchell Report as suggesting that as many as half of all major league players are using some kind of banned, performance-enhancing substances. *See* Mitchell Report, *supra* note 1, at SR-2.

<sup>6</sup> *See* Duff Wilson, *Selig Wants Punishment Toughened on Steroids Use*, N.Y. TIMES, Aug. 5, 2005, at D1; Bob Wolfley, *Selig Says New Drug Policy is Near*, MILWAUKEE J. SENTINEL, Jan. 8, 2005, at C6.

<sup>7</sup> The New York Times recently reported that Sammy Sosa had tested positive for banned substances in 2003. Michael S. Schmidt, *Another Blow to Epic Chase – Sosa is Said to Have Tested Positive in 2003*, N.Y. TIMES, June 17, 2009, at B11. Sosa, along with Mark McGwire, is generally credited as having “saved” baseball following a general strike by the Players Association in 1994 and 1995. *Id.* In February of this year, it was revealed that Alex Rodriguez, the highest-paid player in baseball, tested positive for steroids in 2003. Michael S. Schmidt, *Rodriguez Said to Test Positive in 2003*, N.Y. TIMES, Feb. 8, 2009, at A1.

<sup>8</sup> Many players feel as though they are being collectively investigated merely because of the publicity surrounding the Barry Bonds investigation and its coincidence with his chase of the all-time home-run record. *See* Mel Antonen, *Players Don't See Purpose of Drug Probe*, U.S.A. TODAY, Mar. 31, 2006, at 18C (“Outfielder Torii Hunter of the Minnesota Twins called the investigation ‘stupid’ and said there would be no investigation if Bonds weren’t chasing the all-time home run record.”). Other players contend that the focus should be on other sports, such as the National Football League. *Id.*

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investigators.<sup>9</sup> Perhaps most ominously, the MLB investigation into—and, inherently, the arbitration process associated with—the abuse of performance-enhancing drugs has been decried as something of a “witch hunt.”<sup>10</sup> It has been suggested that the league office is more concerned about presenting evidence to the public of action being taken than with the actual truth of the allegations.<sup>11</sup> Moreover, tensions between the league office and the Players Association may be at an all-time high. An excerpt from the Mitchell Report adequately illustrates the tensions in the atmosphere already:

The Players Association was largely uncooperative. (1) It rejected totally my requests for relevant documents. (2) It permitted one interview with its executive director, Donald Fehr; my request for an interview with its chief operating officer, Gene Orza, was refused. (3) It refused my request to interview the director of the Montreal laboratory that analyzes drug tests under baseball’s drug program but permitted her to provide me with a letter addressing a limited number of issues. (4) I sent a memorandum to every active player in Major League Baseball encouraging each player to contact me or my staff if he had any relevant information. The Players Association sent out a companion memorandum that effectively discouraged players from cooperating. Not one player contacted me in response to my memorandum. (5) I received allegations of the illegal possession or use of performance enhancing substances by a number of current players. Through their representative, the Players Association, I asked each of them to meet with me so that I could provide them with information about the allegations and give them a chance to respond. Almost without exception they declined to meet or talk with me.<sup>12</sup>

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<sup>9</sup> See Jack Curry, *Mitchell Offers Few Details about Steroids Investigation*, N.Y. TIMES, June 3, 2006, at D3 (Senator Mitchell’s report contains little information regarding how information was collected, how sources were located, or specifically how players were identified—beyond the initial accusations. Although Mitchell has promised that details will be forthcoming, none have been given yet); Michael S. Schmidt & Duff Wilson, *Orioles Speak up Against Mitchell Report*, N.Y. TIMES, Dec. 17, 2007, at D1 (Nineteen of the eighty-nine players listed in the Mitchell report played for the Baltimore Orioles. The Orioles were the first team to publicly criticize the manner in which information was gathered and accusations leveled.).

<sup>10</sup> Bob Nightengale, *Sheffield Unfazed by Probe*, U.S.A. TODAY, Feb. 27, 2007, at 1C (Detroit Tigers player Gary Sheffield refused to cooperate with the Mitchell investigation, claiming that the Players Association had told him it was a “witch hunt” and that the entire purpose of the investigation was to “get [Bonds]”).

<sup>11</sup> *Id.*; See also Antonen, *supra* note 8, at 18C. Some players have intimated that the league is only concerned with putting on an appearance of action now because of the scandal surrounding Barry Bonds, and would not be acting but for the amount of public scrutiny surrounding Bonds. *Id.*

<sup>12</sup> Mitchell Report, *supra* note 1, at SR-7.

Certainly in the 2009 season and most likely for the near future, substance abuse will be at the forefront of the mind of each baseball fan.<sup>13</sup> It would be difficult to think that the Commissioner's office does not feel at least some pressure to continue its investigations into substance abuse to prove to fans that efforts are being taken to curb what has become a massive blemish for the game of baseball. As more players are implicated in the scandal for both past and present use, MLB needs to consider both the design and procedural rules of the arbitration system that will handle most of these disputes if the players wish to challenge the league's ruling. When considering any changes that should be made to their own arbitration system, MLB can learn from the challenges faced by another athletic institution that was forced to create an arbitration system to deal with substance abuse issues: the International Olympic Committee (IOC).<sup>14</sup> The mistakes that the IOC made in designing its own arbitration systems—the same mistakes that forced the IOC to create the International Council of Arbitration for Sport to assure athletes of its neutrality—can be avoided with some changes to MLB's arbitration system design.

This note will suggest that MLB should re-examine its arbitration process in three key areas. The first is the selection of the arbitrators and/or arbitration panels that will be eligible to preside over a substance abuse dispute between the league office and a player. As I will discuss below, the Mitchell Report has already been an example of how *not* to select neutral parties that will provide actual and apparent neutrality in arbitrating these disputes. Next, MLB should consider the time frames that it requires all substance abuse investigations and arbitrations to adhere to. Although the MLB must consider some time limits in making its decision, the current arbitration procedures place an unfair burden upon players in deciding how to handle a positive substance abuse test. Finally, the structure of MLB's arbitration procedure is divided into two main institutions – the Health Policy Advisory Committee and the league's standard salary dispute arbitration panel. MLB should join these two halves to create one specialized, cohesive arbitration forum that has the expertise to deal with the very unique arbitration challenges presented by a substance abuse situation.

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<sup>13</sup> See, e.g., Ross Newhan, *Forget Cheaters Never Prosper*, L.A. TIMES, Dec. 16, 2007, at D1 ("In the end, the report is actually a beginning—or a continuation, at least—of an era pockmarked by needles, littered with phony prescription slips.").

<sup>14</sup> See Court of Arbitration for Sport, History of the CAS, <http://www.tas-cas.org/history> (last visited August 5, 2009). Although salary arbitration in baseball is an older institution, the International Olympic Committee was the pioneering body of large scale arbitration proceedings to deal with abuse of performance-enhancing substances. *Id.*

## II. ARBITRATOR SELECTION FROM THE MITCHELL REPORT AND ONWARDS

Major League Baseball is not the first sports organization to face criticism for its substance abuse arbitration process. The International Olympic Committee pioneered the practice of referring such cases to arbitration when it created the Court of Arbitration for Sport (CAS).<sup>15</sup> Although the IOC enjoyed some success in curbing the use of performance-enhancing substances during the height of their investigatory activity (or possibly encouraging the development of newer, harder to detect drugs), the organization soon began to face criticisms about the purpose, fairness, and structure of its arbitration system.<sup>16</sup> These criticisms eventually led to the creation of the International Council of Arbitration for Sport (ICAS)—the body that still monitors the Court of Arbitration for Sport's arbitration process today.<sup>17</sup>

### *A. The International Olympic Committee's Initial Arbitration Procedure, Faced with Criticism over its Independence and Fairness, was Forced to Alter the Entire System Design*

Beginning in the 1980s, the increased number of sports-related disputes led some to call for the creation of a new judicial body that would specialize in handling sports-related arbitration.<sup>18</sup> Olympics enthusiasts pointed to the Cold War and the United States' boycott of the 1980 Moscow games as evidence that a neutral body was needed to arbitrate disputes among the increasingly numerous parties that were involved in the international sports

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<sup>15</sup> *Id.* The use of performance enhancing drugs has a long history in connection with the Olympic Games. See Michele Verroken, *Drug Use and Abuse in Sport*, in *DRUGS IN SPORT* 18, 23 (David R. Mottram ed., 1996). The IOC has banned anabolic steroids since 1974, when the technology to detect those substances was first developed. *Id.* at 23. At that time, the most popular substance abuse was in the form of amphetamines, which athletes often took on the day of competition and were notorious for causing collapses and death due to heart failure. *Id.* at 19–20.

<sup>16</sup> *Id.*

<sup>17</sup> The ICAS has been largely successful in its mission—to monitor the activity of the CAS and ensure its independence as a private judicial body. See generally Nancy K. Raber, *Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport*, 8 *SETON HALL J. SPORTS L.* 75, 90 (1998) (“As a practical matter, recent CAS decisions favorable to athletes may indicate CAS independence from the IOC.”).

<sup>18</sup> See History of the CAS, *supra* note 14.

setting.<sup>19</sup> The need for such an institution was twofold: the prospect of quick, relatively inexpensive arbitration was needed for the Olympics' assemblage of amateur athletes, and the absence of an international judicial body that specifically concentrated on sports-related disputes was a growing problem, one which the IOC believed required a whole area of concentration of its own.<sup>20</sup> At the 1982 IOC meeting in Rome, Juan Antonio Samaranch, the president of the IOC, tapped Judge Keba Mbaye to chair a committee that would be charged with drafting the first set of jurisdictional and procedural regulations of the new judicial body.<sup>21</sup>

The Court of Arbitration for Sport came into effect on June 30, 1984—less than a month before the start of the 1984 Summer Olympic Games.<sup>22</sup> At first, the majority of the cases heard by the CAS concerned the abuse of performance-enhancing substances—both as the first judicial body to hear such a case and as an appellate court reviewing punishment decisions that had been handed down by other judicial institutions.<sup>23</sup> Its reputation as a fair and independent judicial body grew and it was soon hearing cases regarding everything from “the determination of athlete nationality and the validity of employment contracts, to equally varied commercial cases involving television broadcast, sponsorship[,] and licensing rights.”<sup>24</sup> Perhaps because

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<sup>19</sup> Darren Kane, *Twenty Years on: An Evaluation of the Court of Arbitration for Sport*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004* 455, 456 (Ian S. Blackshaw et al. eds., 2006). The leader of this movement was the charismatic new chairman of the International Olympic Committee, Juan Antonio Samaranch. See Matthieu Reeb, *The Court of Arbitration for Sport: History and Operation*, in *RECUEIL DES SENTENCES DU TAS, DIGEST OF CAS AWARDS III 2001–2003* xxvii–xxviii (Matthieu Reeb ed., 2004). Almost immediately after his election to the position, Samaranch began to lobby for the creation for a new judicial body that would deal exclusively with sports-related disputes. *Id.*

<sup>20</sup> See Kane, *supra* note 19, at 456 (“This body was required to be independent from international and national sporting federations (IFs and NFs), and thus needed to avoid the influence of such federations in their adjudicative decision-making, particularly when hearing appeals.”); see also Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004*, *supra* note 19, at 31 (“[A]n international court like the CAS, which can offer specialist knowledge, low cost[,] and rapid action, provides a means of resolving sports disputes adapted to the specific needs of the international sporting community.”).

<sup>21</sup> See Reeb, *supra* note 19, at xxvii–xxviii.

<sup>22</sup> See History of the CAS, *supra* note 14.

<sup>23</sup> Kane, *supra* note 19, at 457. The fact that the CAS was faced with substance abuse cases upon its inception is not surprising considering the circumstances.

<sup>24</sup> *Id.* One of the main attractions of the newly-formed CAS was that it could hear such a wide variety of cases. This was consistent with Samaranch's idea that sports law was so vast that it would require its own substantive body—what had in the past been

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the CAS offered over sixty arbitrators to handle a wide range of disputes, it was the exclusive court of arbitration for all International Olympic Committee claims and also handled appeals cases from the Federation Internationale de Football Association (FIFA) and other sports bodies.<sup>25</sup>

From its outset, the CAS adopted a system of regulations that provided a description of the structure of the CAS arbitration panels, the selection process for arbitrators, jurisdictional rules, and the basic procedural rules that all CAS arbitration panels were bound to follow.<sup>26</sup> All members of the CAS had to “be recognized as competent in the field of sport” and have some sort of legal education.<sup>27</sup> Originally, there were to be forty members, although this was later increased to sixty at the direction of the IOC Executive Board in 1986.<sup>28</sup> The CAS members were to also be selected according to their geographic origin—a feature that some have suggested was borrowed from the Permanent Court of Arbitration at The Hague.<sup>29</sup> In keeping with the very first article of the CAS statutes, jurisdiction depended on the whether or not the cases “may bear on questions of principle relating to sport or on pecuniary or other interests affected on the occasion of the practice or the development of sport.”<sup>30</sup> For years, the CAS was widely lauded for its collection of sports law experts from around the world as well as its novel approach to dealing with issues that otherwise would have been arbitrated by national bodies—leaving athletes to deal with a patchwork of national laws

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called the “*lex sportiva*”. See JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 63 (2d ed. 2003); but cf. Allan Erbsen, *The Substance and Illusion of Lex Sportiva*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004*, *supra* note 19, at 441–54 (alleging that rather than embodying the already existing *lex sportiva* principles, the CAS has created its own substantive common law).

<sup>25</sup> FIFA statutes identify the CAS as the judicial body for all appeals from FIFA decisions. FIFA Statutes Section VIII, Article 62, available at <http://www.fifa.com/aboutfifa/federation/statutes.html>.

<sup>26</sup> See Kane, *supra* note 19, at 457–58. The idea that the CAS would create its own common law was seen by some as antithetical to what the purpose of the CAS should have been—to state what the *lex sportiva* was rather than come up with new principles. See Erbsen, *supra* note 24, at 441–54.

<sup>27</sup> The almost immediate need for an increase in the number of available arbitrators is a good indicator of how popular the newly-formed CAS was. Bruno Simma, *The Court of Arbitration for Sport*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004*, *supra* note 19, at 21, 23.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 24.

instead of a fairly consistent set of regulations.<sup>31</sup> It was the forum of choice for a number of international athletes and generally enjoyed an unblemished record as to its fairness and impartiality.

### *B. Elmer Gundel and the Need for Reform of the CAS Arbitration System*

In 1993, the ability of the CAS to deliver unbiased, fair decisions was seriously questioned by the Swiss Federal Tribunal in *Gundel v. Federation Equestre Internationale*.<sup>32</sup> The FEI, a European horse-racing league, had found that Elmer Gundel, a rider from Germany, had injected both himself and his horse with performance-enhancing substances at a major international equestrian event.<sup>33</sup> Gundel appealed his three-month suspension to the CAS and actually had his sentence reduced by two months.<sup>34</sup> Still not happy with the CAS decision, Gundel appealed his case to the Swiss Federal Tribunal.<sup>35</sup> Swiss law requires that for any court to be considered a proper arbitration court, it must meet certain standards pertaining to impartiality and independence.<sup>36</sup> Although the Swiss court technically did not issue a definitive statement on the impartiality of the CAS, the decision clearly questioned whether or not the CAS could be considered an independent body when it was so closely linked to and funded by the IOC. The message to the IOC was clear—make changes to the CAS structure or be prepared to have its decisions overturned in Swiss Federal Court.<sup>37</sup>

One of the main issues that the court focused on was the method through which the CAS selected its arbitrators.<sup>38</sup> Under the original 1983 plan, each of four bodies would be able to select fifteen of the sixty arbitrators to be included on the roster—the IOC, the International Federations for Olympic Sports, the National Olympic Committees, and the IOC President.<sup>39</sup> This

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<sup>31</sup> See Ian Blackshaw, *Sport's Court Getting Right Results*, THE GUARDIAN, June 3, 2004, at 31 ("Since [1984] it has become a highly respected, fair[,] and effective forum for settling speedily and inexpensively a wide range of sports disputes.").

<sup>32</sup> Official Digest of Federal Tribunal Judgments, 119 II 271; see also Matthieu Reeb, *Introduction*, in DIGEST OF CAS AWARDS II 1998–2000 xxix (Matthieu Reeb ed., 2001).

<sup>33</sup> Reeb, *supra* note 20, at 33–34.

<sup>34</sup> *Id.* at 33.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 33–34.

<sup>38</sup> *Id.*

<sup>39</sup> See Kane, *supra* note 19, at 457.



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formula meant that all sixty arbitrators were selected by some kind of Olympic commission—the athletes themselves had no input as to who would be hearing their cases. The arbitrators were also appointed to terms of only four years and the President of the IOC had “considerable” power in deciding which members would be reappointed.<sup>40</sup> The Swiss Court also questioned the funding structure of the CAS. Specifically, the court noted that the arbitration panels, although relatively inexpensive, were almost exclusively funded by the Executive Board of the IOC.<sup>41</sup>

Because of the Gundel decision, the IOC instituted major reforms in 1994.<sup>42</sup> The previous system of statutes and regulations was revised to create a new “Code of Sports-Related Arbitration” on November 22, 1994.<sup>43</sup> The Code created a new financing structure for the CAS that would, in theory, leave no doubt as to the independence of the CAS from the IOC and its powerful President, Samaranch.<sup>44</sup> The Code also featured a bifurcated format: the structural and financial reforms were contained in the “Statutes of the Bodies Working for the Settlement of Sports-related Disputes” and the new procedural guides for CAS members would be in the “Procedural Rules” section.<sup>45</sup>

The biggest change to result from the 1994 modifications to the CAS was the formation of a completely new body—the International Council of Arbitration for Sport (ICAS).<sup>46</sup> The ICAS has been described as:

[T]he supreme organ of the CAS. It is a foundation under Swiss law. The main task of the ICAS is to safeguard the independence of the CAS and the rights of the parties. To this end, it looks after the administration and financing of the CAS. The ICAS is composed of 20 members who must all be high-level jurists well-acquainted with the issues of arbitration and sports law.<sup>47</sup>

Perhaps more importantly, the ICAS does not include any members selected by the IOC.<sup>48</sup> Its members are selected by the already-existing members and the board is elected without any input from the IOC.<sup>49</sup> These changes largely

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<sup>40</sup> Reeb, *supra* note 20, at 33.

<sup>41</sup> *Id.*

<sup>42</sup> See History of the CAS, *supra* note 14.

<sup>43</sup> Reeb, *supra* note 20, at 34.

<sup>44</sup> *Id.*

<sup>45</sup> See NAFZIGER, *supra* note 24, at 43.

<sup>46</sup> *Id.*

<sup>47</sup> Reeb, *supra* note 20, at 35.

<sup>48</sup> See *id.*

<sup>49</sup> *Id.*

accomplished the goal of separating the CAS arbitrators from the IOC to a large enough degree that the Swiss courts have since affirmed its independence in several decisions.<sup>50</sup>

*C. MLB Should Examine its own Arbitrator Selection Process and System Design to Avoid the Criticisms Leveled at the IOC in the Wake of the Gundel Case*

The Mitchell Report has proven to have another useful function for MLB besides identifying past steroids abusers—it serves as a clear warning of the problems that can arise when the investigators and arbitrators involved in substance abuse arbitration have their neutrality called into question. It did not take much time for both the athletes involved and the media to question whether Senator Mitchell's own personal connections to baseball might have had an effect on his investigation.<sup>51</sup> Senator Mitchell, albeit well before the time of his investigation, was a director of the Boston Red Sox baseball club.<sup>52</sup> The fact that no current Red Sox players were named in the Mitchell report raised even more tensions with other teams that felt they had been unfairly targeted.<sup>53</sup> In addition to his work with the Red Sox, Mitchell served

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<sup>50</sup> See Emile Vrijman, *Experiences with Arbitration Before the CAS: Objective Circumstances or Purely Individual Impressions?*, in COURT OF ARBITRATION FOR SPORT 1984–2004, *supra* note 19, at 65 (There had been some question as to the continued impartiality of the CAS, mostly because of its use of a closed list of approved arbitrators—parties were not free to suggest an arbitrator from outside the list—and the payment of the travel and accommodation expenses of CAS arbitrators by the IOC. The Swiss Federal Supreme Court found that it was “unlikely” that these payments were affecting the independence of the arbitrators).

<sup>51</sup> See Childs Walker, *A Bit Too Connected?: Mitchell's Ties to Red Sox*, *ESPN Raising Concerns*, BALTIMORE SUN, Dec. 12, 2007, at 4Z. As this article notes, the majority of the criticism leveled at Senator Mitchell has not suggested that he was necessarily impartial or unfair in his investigation, but rather asked why MLB Commissioner Bud Selig would leave any room for doubt by selecting an individual with so many personal ties and interests. These concerns were raised before the Mitchell Report was ever published. See Tim Brown, *Mitchell's Baseball Ties Raise Questions*, L.A. TIMES, Mar. 31, 2006, at D1.

<sup>52</sup> See Walker, *supra* note 51, at 4Z. Senator Mitchell does mention the fact that he was a director of the Boston Red Sox, in addition to several other personal ties to baseball, in an appendix to the report. See Mitchell Report, *supra* note 1, at A-1. In addition to being connected to the Red Sox, Mitchell was on the board of the Disney Corporation when it owned part of the Anaheim Angels, and for one year sat on the board of directors for the Florida Marlins. *Id.*

<sup>53</sup> See Walker, *supra* note 51, at 4Z. It is perhaps most disturbing that the rivalries between certain MLB franchises was a reason for some to doubt the bias-free nature of

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as the Chairman of the Board of Directors of the Disney Corporation until the January before his investigation began.<sup>54</sup> Disney is a partial owner of the Entertainment and Sports Programming Network (ESPN), which is a major broadcast partner of MLB.<sup>55</sup>

Whether or not Senator Mitchell's personal connections to MLB had any effect on his investigation and report is outside the purview of this note. What is important to focus on, however, is that MLB can avoid questions of impropriety in the future through a more careful selection of which individuals are going to be involved in the substance abuse arbitration process. In the arbitration process, the mere *appearance* of bias on the part of the arbitrator can be as damaging to the reputation of the system's fairness as actual bias.<sup>56</sup> For MLB's purposes, where the appearance of a fair and just procedure is critical to appeasing both players and fans, the importance of neutral arbitrator selection is of the utmost importance.

The actual process of arbitrator selection in MLB is much different from that of the IOC in one important respect: the presence of a cohesive union to represent the interests of athletes. In the case of MLB, the Major League Baseball Players Association (the Players Association) has, so far, been the counterpart and frequent obstacle to MLB's proposed ideas for changing the current substance abuse testing and arbitration program. The current incarnation of the Players Association was created in 1965.<sup>57</sup> Since that time, the Players Association has introduced collective bargaining techniques to deal with player's salary disputes and, since 1970, has instituted arbitration as a method of dealing with player's disputes with league management.<sup>58</sup> Over the course of the past forty years, the Players Association has come to be widely regarded as the most powerful union in professional sports, and

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the investigation. See Jim Baumbach, *Yankees Notebook: Investigator Shouldn't be in MLB, Torre Says*, *NEWSDAY*, Apr. 8, 2006 ("To me, if you want an impartial person, you should probably separate that person from anything having to do with baseball," [former Yankees manager Joe] Torre said. "Not that they shouldn't be knowledgeable of it, but any connection to the game I think is a little tough.").

<sup>54</sup> Mitchell Report, *supra* note 1, at A-1.

<sup>55</sup> Walker, *supra* note 51, at 4Z.

<sup>56</sup> See generally Cheryl Nichols, *Arbitrator Selection at the NASD: Investor Perception of a Pro-Securities Industry Bias*, 15 OHIO ST. J. ON DISP. RESOL. 63, 64 (1999) ("It is important to the legitimacy of any nonjudicial forum that it be perceived by the participants as fair to all parties. If fairness is a concern, the arbitral forum's existence as a viable alternative dispute resolution mechanism will be undermined.").

<sup>57</sup> See History of the Major League Baseball Players Association, <http://mlbplayers.mlb.com/pa/info/history.jsp> (last visited August 5, 2009).

<sup>58</sup> *Id.*

probably one of the most well-represented labor unions in the entire country.<sup>59</sup>

While the reformed CAS does mandate that at least part of its membership be selected with the interests of the athletes in mind, this effort has been somewhat lacking at specifying a procedure for ensuring such equality.<sup>60</sup> Even if there was a procedure or a set of criteria for selecting the “athlete representatives,” one can imagine the problems this would create. There are over thirty-five “sports” between the Summer and Winter Olympic Games with over 400 separate events.<sup>61</sup> With dozens of countries represented in the Winter Games, and hundreds in the Summer Games, it is difficult to think that such a wide range of athletes could agree upon any sort of cohesive union. Major League Baseball does not face any such problems. The Players Association has proven to be both an effective check on the power of league management and a respected institution that protects the interests of athletes. The Players Association holds itself open to every member of an MLB roster, as well as other individuals who have signed contracts with major league teams, for a total of around 1,200 members.<sup>62</sup> The Players Association has demonstrated its willingness to strike as recently as 1994, and there have been five strikes over the course of the Players Association existence.<sup>63</sup>

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<sup>59</sup> ROBERT F. BURK, NEVER JUST A GAME: PLAYERS, OWNERS, AND AMERICAN BASEBALL TO 1920 10 (1994).

<sup>60</sup> See generally Reeb, *supra* note 19. The ICAS requires that one-fifth of its membership be selected to represent the “interests of athletes,” but no criteria is given as to what sort of qualifications that would entail. *Id.* at xxxiii.

<sup>61</sup> Olympic Movement Official Site, Sports, [http://www.olympic.org/uk/sports/index\\_uk.asp](http://www.olympic.org/uk/sports/index_uk.asp) (last visited August 5, 2009).

<sup>62</sup> See Major League Players Association: Frequently Asked Questions, <http://mlbplayers.mlb.com/pa/info/faq.jsp#membership> (last visited August 5, 2009) (“All players, managers, coaches and trainers who hold a signed contract with a Major League club are eligible for membership in the Association. In collective bargaining, the Association represents around 1,200 players, or the number of players on each club’s 40-man roster, in addition to any players on the disabled list.”).

<sup>63</sup> *Id.* While the Players Association has been overwhelmingly successful in the arbitration of disputes relating to contracts and salaries of Major League Players, it has been placed at somewhat of a disadvantage in substance abuse setting. The Mitchell Report described at some length the difficulty in which Senator Mitchell had in speaking to players about the steroids culture around the league. See Mitchell Report, *supra* note 1, at SR-7. The image that has emerged in the minds of most fans and commentators is that the league office is primarily interested in “cleaning up” the game while the Players Association resists such efforts through encouraging its members to remain silent and not speak to investigators. *Id.*

## CHANGING BASEBALL'S SUBSTANCE ABUSE ARBITRATION PROCEDURE

The guidelines that inform MLB's substance abuse arbitration procedure are spelled out in the Joint Drug Agreement.<sup>64</sup> Immediately after a positive test for a banned substance, the Independent Medical Examiner must notify the Health Policy Advisory Committee (HPAC).<sup>65</sup> The HPAC then notifies both the player who has tested positive, as well as their club, of the test result.<sup>66</sup> The HPAC is made up for four individuals—two licensed physicians and two bar-certified attorneys.<sup>67</sup> Both the Players Association and the League office have the right to designate one physician and one attorney each.<sup>68</sup> The makeup of the HPAC is detailed on their website:

The Health Policy Advisory Committee ("HPAC") is responsible for administering and overseeing the Program. HPAC shall be composed of one medical representative ("Medical Representative") from each of the Parties (both of whom shall be licensed physicians expert in the diagnosis and treatment of chemical use and abuse problems), and one other representative each from the Office of the Commissioner and the Association (both of whom shall be licensed attorneys).<sup>69</sup>

The HPAC is also responsible for initially designating an Independent Medical Examiner, usually a laboratory specializing in performance-enhancing substance abuse detection, which will carry out the individual tests.<sup>70</sup> If the HPAC cannot agree upon an Independent Medical Examiner, then an ad hoc member of the HPAC must be agreed upon by the four individuals mentioned above within forty-eight hours.<sup>71</sup>

The HPAC hearing is only the first stop for a player who wishes to take his substance abuse case through to arbitration. The HPAC's mandate is somewhat broad—it sets the schedule for testing, rules on what procedures shall be used, rules on whether new testing procedures will be allowed or not, and is charged with educating all players on the dangers of substance

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<sup>64</sup> Major League Baseball's Joint Drug Prevention and Treatment Program [hereinafter Joint Drug Agreement], available at [http://mlb.mlb.com/mlb/downloads/joint\\_drug\\_prevention\\_and\\_treatment\\_program\\_2005.pdf](http://mlb.mlb.com/mlb/downloads/joint_drug_prevention_and_treatment_program_2005.pdf).

<sup>65</sup> *Id.* There is no clarification in the Joint Drug Agreement as to which members shall be contacted first, in what order, or even if all members of the HPAC will be contacted at the same time.

<sup>66</sup> *Id.* at 7.

<sup>67</sup> *Id.* at 1.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Joint Drug Agreement, *supra* note 64, at 2.

<sup>71</sup> *Id.* at 1.

abuse.<sup>72</sup> Despite this overly broad mandate, the HPAC has no disciplinary powers over players who have turned in a positive test result.<sup>73</sup> Their scope of involvement with the players, after a positive test has occurred, is limited to putting them on the “administrative” or “clinical” track.<sup>74</sup> Clinical track athletes are those who have tested positive for the use of non-enhancement drugs, such as cocaine or marijuana. Athletes who have used drugs that have been deemed by Major League Baseball to enhance performance are immediately placed upon the administrative track.<sup>75</sup> If they then wish to arbitrate their case, they must petition the league’s central arbitration office.<sup>76</sup>

In practice, arbitrator selection in the MLB system is governed by one principle: parity between the Players Association and the MLB league office. This overarching goal is apparent when one considers the procedures that a player who tested positive for a banned substance would face. While these efforts at equalizing power between MLB and the Players Association are one method for achieving objectivity in the arbitration proceeding, they also serve to reinforce the notion that the outcome of a player’s case will depend on which party’s nominated arbitrator will hear the case, instead of the guilt or innocence of the individual.<sup>77</sup> In a substance abuse arbitration setting, which bears so many similarities to a criminal procedure, the reinforcement of this idea is contrary to the league’s efforts in setting up a “fair” system in which to arbitrate. Rather, the league should gear its system towards one that would lead parties to think that arbitration will be fair no matter who hears their case. Considering the impact that the HPAC has upon the ultimate decision of a player, MLB should consider a three-party model of arbitrator selection, adjusted to keep the number of individuals involved at five. Changing the structure of the HPAC is perhaps the most important step that

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<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.* at 3.

<sup>74</sup> *Id.* at 2.

<sup>75</sup> *Id.* at 7.

<sup>76</sup> Only one player has thus far appealed his case all the way to the League’s arbitration office. Rafael Palmeiro submitted his case to a league arbitration panel and was denied. See Jeff Barker, *Palmeiro Provided No Details About Test: Result Was Not Explained in Arbitration*, BALTIMORE SUN, Aug. 19, 2005, at 1A.

<sup>77</sup> See generally Elizabeth A. Murphy, *Standards of Arbitrator Impartiality: How Impartial Must They Be?*, 1996 J. DISP. RESOL. 463, 463 (1996) (“One of the most crucial aspects of the arbitrator’s role is neutrality. For arbitration proceedings to achieve a fair resolution of disputes, the arbitrator must make his decision without bias. All jurisdictions allow vacation of arbitration awards where there is ‘evident partiality’ on the part of an arbitrator appointed as neutral.”).

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MLB can take, considering that it is the only step that most players who turn in a positive test will ever experience.<sup>78</sup>

Three-party arbitrator selection allows each side to nominate an even number of individuals who cannot be peremptorily challenged by the opposing party, which MLB already does in the HPAC.<sup>79</sup> The selected representatives then choose a fifth individual, who will act as the chairperson for the arbitration hearing. The advantage to this model is that neither party's appointed representative has control over the arbitration:

Where an arbitration uses a three-arbitrator panel, as is common in commercial arbitration, each party has the right of direct selection of a single arbitrator, and the two arbitrators selected usually have joint responsibility for the selection of a third. As a result, each party is ensured that there is at least one representative on the panel reflecting his own desired approach to the subjects in dispute with a second having no significant objections to it. On the other hand, if a single arbitrator is used in a dispute, he will usually be selected through agreement of the parties, again allowing both parties to ensure that their views will receive full consideration.<sup>80</sup>

Switching the HPAC to a system in which the representatives selected by each party would then select a chairperson for the proceedings would allow each party to still have an adequate voice in the procedure, but place less importance on which party's nominee would be the ultimate decisionmaker.

### III. PROCEDURAL RULES AND REGULATIONS IN SUBSTANCE ABUSE ARBITRATION

One reason why substance abuse might be a particularly difficult subject with regards to arbitration system design is the fact that so much of the resulting procedures will resemble a criminal trial. While MLB arbitrators are not likely to hand down jail sentences anytime soon, the use of most of the substances on the league's "prohibited" list is also punishable by federal law.<sup>81</sup> Senator Mitchell recommended in his report that MLB start

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<sup>78</sup> To date, Rafael Palmeiro is the only individual to appeal the punishment given to him for violating the league's substance abuse rules to an arbitration panel beyond the HPAC. See Barker, *supra* note 76, at 1A.

<sup>79</sup> See Joint Drug Agreement, *supra* note 64.

<sup>80</sup> Tony Cole, *Commercial Arbitration in Japan: Contributions to the Debate on Japanese "Non-Litigiousness"*, 40 N.Y.U. J. INT'L L. & POL. 29, 99 (2007).

<sup>81</sup> A list of the substances that have been banned by the league is listed on the Joint Drug Agreement, *supra* note 64, at 23. A short glance at the list will show that most, if not all, of the substances are illegal, or illegal without a valid doctor's prescription. *Id.*

cooperating with law enforcement officials more readily, perhaps signaling a willingness on the part of MLB to turn players who use illegal substances over to the authorities:

Recently, law enforcement agencies have become increasingly flexible and creative in sharing with professional sports organizations information gathered during investigations. This practice makes sense because law enforcement agencies typically focus their efforts in illegal drug investigations on prosecution of the manufacturers, importers, and distributors, not on the athletes who are the end users. During these investigations, however, law enforcement agencies often accumulate evidence of use by individuals.<sup>82</sup>

Even without the threat of criminal action, MLB has handed down some hefty suspensions in the past over substance abuse, and these suspensions are without pay under the drug agreement currently in effect.<sup>83</sup> When one considers the amount of money that most MLB players make in a single season, the arbitration panels are handling cases that concern hundreds of thousands and sometimes millions of dollars in lost earnings.<sup>84</sup> Besides the monetary implications, the negative publicity surrounding a player who is accused of substance abuse has consequences for the player's future contracts and reputation. One of the most controversial aspects of the Court of Arbitration for Sports' operations, and perhaps the one that relates most directly to the problems facing Major League Baseball, has been the presence of the ad hoc division at every Olympiad since the 1996 Atlanta Summer Games.<sup>85</sup> The procedural rules that govern the hearings of this arbitration panel, as well as an atmosphere where some have suggested that the arbitrators are more likely to be influenced by the IOC, have led to some harsh criticism of the ad hoc arbitration panel as offensive to the concept of fairness and due process.<sup>86</sup>

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<sup>82</sup> See Mitchell Report, *supra* note 1, at 290.

<sup>83</sup> To date, the longest suspension handed down to an MLB player is eighty days, which was handed down to Detroit Tigers infielder Neifi Perez after his third positive steroid test. ESPN.com, *Tigers' Perez Tests Positive for Stimulant for Third Time*, Aug. 4, 2007, <http://sports.espn.go.com/mlb/news/story?id=2960193> (last visited August 5, 2009). The total amount of salary lost during Perez' previous and final suspensions combined was \$1,188,525. *Id.*

<sup>84</sup> See *Id.*

<sup>85</sup> See generally Richard McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515 (2001).

<sup>86</sup> See generally Andrew Goldstone, Note, *Obstruction of Justice: The Arbitration Process for Anti-Doping Violations During the Olympic Games*, 7 CARDOZO J. CONFLICT RESOL. 361 (2006) (offering an overall criticism of the ad hoc division as an impingement upon the due process rights of athletes and suggesting several reforms that,



*A. The Court of Arbitration for Sport's use of the Ad Hoc Division in the Past has Raised Some Criticisms as to its Fairness*

The first ad hoc division was in session at the 1996 Summer Games in Atlanta from July 19 to August 4, 1996.<sup>87</sup> The original purpose of the Olympic Division, as it was officially called, was described by one of its founders and its first President, Gabrielle Kaufmann-Kohler:

In creating the Olympic Division, the CAS was pursuing the objective of providing athletes and other participants (Federations, National Olympic Committees, officials, trainers, doctors, etc.) with a body able to resolve disputes occurring during the Games in a final manner within time limits appropriate to the pace of competition . . . . In other words, if we were to use media speak, the goal was to offer a fair, fast[,] and free method of resolving disputes.<sup>88</sup>

The new division was smaller than the full CAS body—consisting of just twelve arbitrators with sports experience and drawn from geographically-diverse locations.<sup>89</sup> During those first Atlanta games, the ad hoc division heard just six cases.<sup>90</sup>

One of those cases is illustrative of the way in which arbitrations normally took place. Michelle Smith was an Irish swimmer whose ability to participate in the 400 meter freestyle was being challenged by the U.S. Swimming Federation.<sup>91</sup> The application for arbitration by the ad hoc division was filed at 6:10 p.m. the night before the preliminary heat.<sup>92</sup> A three-member arbitration panel was immediately convened and summoned before it three parties: a German delegation that supported and was representing the U.S. position, an Irish Olympic delegation, and an IOC

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while keeping the ad hoc division in place, would amend its specific procedures and regulations).

<sup>87</sup> GABRIELLE KAUFMANN-KOHLER, *ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW* 105 (2001).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 106. The complete list of arbitrators for the 2000 Sydney games is also available. *Id.* at 42. It is an impressive assembly of figures in the sports arbitration world to say the least and contains many of the same names listed as authoritative sources throughout this note.

<sup>90</sup> *Id.* at 1–2. Kaufmann-Kohler mentions that with the exception of one case, the first six arbitrations heard by the ad hoc division were “reasonably straightforward.” *Id.*

<sup>91</sup> KAUFMANN-KOHLER, *supra* note 87, at 111.

<sup>92</sup> *Id.*

representative.<sup>93</sup> Arguments lasted until 12:30 a.m.—all the events were witnessed and taken down by a court reporter.<sup>94</sup> At 2:00 a.m., the arbitration panel handed down its decision allowing Smith to compete.<sup>95</sup> The entire application, hearing, and decision had taken less than eight hours.<sup>96</sup> If this seems short, keep in mind that according to its own rules, the ad hoc panel is bound to give a decision with twenty-four hours of the lodging of the complaint.<sup>97</sup> The 1998 Nagano Winter Games were another big step. A total of six cases were referred to the ad hoc division—the same number as Atlanta, but when one considers that the winter games have about a third as many athletes and events as the Summer Games, it appeared that the ad hoc division was becoming more widely accepted as a legitimate arbitration body.<sup>98</sup> There was only one doping case involved at those games in which Canadian snowboarder Ross Rebagliati kept his gold medal despite testing positive for marijuana after the event.<sup>99</sup>

Although the ad hoc division has been credited with maintaining an impartial and obviously experienced coterie of arbitrators during the games, this is not to say that the division has been without its criticisms. Certainly one of the most controversial aspects of the ad hoc divisions is its adherence to the strict liability theory on doping.<sup>100</sup> Strict liability theory on doping

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<sup>93</sup> *Id.* This, however, would not be Smith's last run-in with arbitration procedures in sports. Two years after the Atlanta Games, she was banned by the Federation Internationale de Natation (or FINA, swimming's governing body) from competing for four years. Kevin Mitchell, *Hot Waters Rose to Engulf Irish Rose*, THE OBSERVER, Feb. 29, 2004, available at <http://sport.guardian.co.uk/news/story/0,10488,1158666,00.html>.

<sup>94</sup> KAUFMANN-KOHLER, *supra* note 87, at 112.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 111–12 (The case is listed as *US Swimming v. FINA*. A complete copy is listed RECUEIL DES SENTENCES DU TAS, DIGEST OF CAS AWARDS 1986–1998 377 (Matthieu Reeb ed., 1998)).

<sup>97</sup> KAUFMANN-KOHLER, *supra* note 87, at 128. Article 18 specifies that an ad hoc arbitration panel has twenty-four hours from the time of the filing of the application to hand down a decision, although the President of the ad hoc Division can extend that time frame if required by the circumstances. By Kaufmann-Kohler's own admission, this would be extraordinarily rare.

<sup>98</sup> *Id.* at 99.

<sup>99</sup> *Id.* at 95–100 (In *Rebagliati v. IOC*, the arbitration panel found that because the IOC had not reached any agreement with the International Ski Federation, a sanction for marijuana use could not be imposed. The court did consider the fact that marijuana, if anything, probably hurt Rebagliati's performance rather than enhanced it).

<sup>100</sup> See Goldstone, *supra* note 86, at 367–86; see also Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1249 (2005) (Some critics have suggested that the ad hoc division should also address concerns over jurisdiction as a judicial body acting

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maintains that if even the slightest trace of a banned substance is found within an athlete's blood, the arbitration panel is free to assume that the athlete in question is guilty of ingesting the drug in question—whether knowingly or not is irrelevant.<sup>101</sup> The effect is what many in America would consider to be an unfair violation of due process—the presence of any physical evidence shifts the burden of proof to the defendant, in this case, the athlete.<sup>102</sup>

Surely the most controversial example of the circumstances that can result from the application of strict liability theory was the case of a Romanian gymnast, Andreea Raducan. Raducan was just sixteen years old when she won the gold medal as part of the Romanian women's gymnastics team at the 2000 Sydney Summer Games.<sup>103</sup> Raducan's team won the gold on September 19, 2000 and, contrary to common procedure, was not tested for banned substances immediately following the competition.<sup>104</sup> The next day, after complaining of a headache to her team physician, she was given some medication for the common cold.<sup>105</sup> Unbeknownst to Raducan, and allegedly unbeknownst to the team physician as well, the medicine that she ingested contained pseudoephedrine—a banned substance that is a common ingredient in over-the-counter decongestants.<sup>106</sup> Raducan competed again the next day, September 21, in the Women's Individual All-Around event.<sup>107</sup> She ingested another pill containing pseudoephedrine before the competition and again came away with a gold medal.<sup>108</sup> This time, Raducan was tested immediately after the competition, and the pseudoephedrine showed up in that test.<sup>109</sup> Five days later, the IOC stripped Raducan of her medal in the Women's All-Around competition.<sup>110</sup> When the ad hoc arbitration panel refused to hear her claim, Raducan filed an appeal with the Swiss Federal Court—the same court that had cast doubt on the legitimacy of the CAS

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extraterritorially in nations where they have not been mandated or approved by the national governments).

<sup>101</sup> See Goldstone, *supra* note 86, at 368–69.

<sup>102</sup> *Id.*

<sup>103</sup> KAUFMANN-KOHLER, *supra* note 87, at 80 (The text that appears in Kaufmann-Kohler's book is the translated English version of the appeals decision handed down by the Swiss Federal Court after Raducan appealed the ruling of the CAS ad hoc panel).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See Goldstone, *supra* note 86, at 372.

<sup>107</sup> KAUFMANN-KOHLER, *supra* note 87, at 82.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 82.

<sup>110</sup> *Id.* at 84.

years before in the *Gundel* decision.<sup>111</sup> The ad hoc arbitration panel's reason for denying the case was as blunt as it was short: Raducan had ingested the substance, it was clearly designated as banned on the IOC list, and that was all that needed to be considered.<sup>112</sup> This time, the Swiss court upheld the arbitration panel's decision without casting any doubts as to its independence.<sup>113</sup>

These concerns about the ad hoc division's approach to substance abuse cases may explain the strange phenomenon at the 2004 Athens Summer Games: during that event, the number of athletes who were accused of doping skyrocketed—over twenty athletes were accused of doping and all of them either had their medals revoked or their results annulled.<sup>114</sup> This was either a result of more athletes using banned substances or simply a higher percentage of athletes being caught—there were 25% more tests conducted in Athens than there were in the 2000 Sydney Games.<sup>115</sup> One would think that this huge increase in the number of doping accusations would result in a proportional increase in the number of cases being brought before the CAS ad hoc panels. Despite the increase in the number of cases, however, only one was appealed to the ad hoc division—that of Kenyan boxer David Munyasia.<sup>116</sup>

Munyasia's sole case that year provided another example of what some athletes might distrust about the procedural rules of the ad hoc panels. Munyasia had provided a urine sample to the IOC upon his arrival at the Olympic Village—several days before he was to actually compete.<sup>117</sup> The World Anti-Doping Agency (WADA), an international organization that conducted tests during the Athens Olympiad, informed the IOC that Munyasia had tested positive for the banned substance cathine. The IOC called together a disciplinary commission and informed Munyasia that he had tested positive for a banned substance and would be expelled immediately from the Olympic Village (and, with no visa to be in Greece except for the Games, would be sent back home by his National Organizing

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<sup>111</sup> *Id.* at 80–92.

<sup>112</sup> See Goldstone, *supra* note 86, at 373. In some instances, the ad hoc division will refuse to hear any testimony related to how a certain substance was ingested, since the strict liability theory mandates that this information is irrelevant. *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Richard McLaren, *The CAS Ad Hoc Division at the Athens Olympic Games*, 15 MARQ. SPORTS L. REV. 175, 179–80 (2004) (Professor McLaren was, along with Ms. Kaufmann-Kohler, one of the first members of the ad hoc Division).

<sup>115</sup> *Id.* at 181.

<sup>116</sup> *Id.* at 182.

<sup>117</sup> *Id.*

Committee).<sup>118</sup> At that disciplinary hearing, Munyasia argued that the positive test was either a mistake or that he had ingested cathine through an accident.<sup>119</sup> He pleaded with the IOC commission to allow him to send a sealed sample to another laboratory for independent testing—a request which the commission denied.<sup>120</sup>

The controversial aspect of Munyasia's case was not the actual doping accusation, but the manner in which his appeal to the CAS' ad hoc division panel was handled.<sup>121</sup> Because Munyasia had already been sent home by the IOC, his hearing was conducted without his presence.<sup>122</sup> Although athletes have their own individual rights to appeal a decision of the ad hoc division, in reality they are often dependent upon the expertise of their national organizing committee or the international federation for their specific sports (e.g. Federation Internationale de Natation for swimmers) to argue before the ad hoc panel that the athlete has a right to appeal in the first place.<sup>123</sup> The effect of this dependency is that when an athlete is sent home, as Munyasia was, it makes any subsequent appeal of that decision to the ad hoc division virtually impossible.<sup>124</sup>

One issue that is not a problem with the IOC ad hoc division *per se* is the tendency of doping officials to make public statements regarding an athlete's guilt before an arbitration panel has heard the case. Consider the case of Tyler Hamilton, an American cyclist who was accused of doping during the 2004 Athens Olympic Games.<sup>125</sup> The testing at that event was again handled

<sup>118</sup> *See Id.* at 183.

<sup>119</sup> *Id.* at 182.

<sup>120</sup> McLaren, *supra* note 114, at 182. To be fair, Mr. Munyasia later admitted that he was a regular user of Miraa—a popular, mildly addictive plant-based stimulant that is used throughout Kenya. Miraa contains high levels of cathinone. *See* Samson Ateka, *Boxer Munyasia is Back*, THE STANDARD, Sept. 9, 2006, available at [http://www.eastandard.net/archives/cl/hm\\_news/news\\_s.php?articleid=1143958316&date=17/9/2006](http://www.eastandard.net/archives/cl/hm_news/news_s.php?articleid=1143958316&date=17/9/2006).

<sup>121</sup> *See* McLaren, *supra* note 114, at 182.

<sup>122</sup> *Id.* at 183. While there is no indication that Munyasia's case ever repeated itself with another Olympic athlete, its singular occurrence is enough to raise due process concerns.

<sup>123</sup> *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> *See generally* Michael O'Connor, *Doping Probe May Tarnish Tyler*, BOSTON HERALD, Sep. 22, 2004, at 004. Hamilton turned in a positive substance abuse test after winning a gold medal at the Athens games, but his backup sample was accidentally destroyed by the Athens laboratory that was storing it. *Id.* The Russian Olympic Federation petitioned the CAS to strip him of his medal after the games and award it to a Russian cyclist, which the CAS refused to do. *Id.*

by WADA.<sup>126</sup> Before Hamilton had a chance to have his case heard before a disciplinary body, and well before he would have had any occasion to appeal his case to the CAS, testing officials from WADA began making public statements condemning the cyclist.<sup>127</sup> WADA Officials were essentially taking the strict liability theory one step further—athletes were not only deemed guilty of doping upon a positive test result, they were also deemed worthy of public condemnation immediately after the test. For all the advances that modern science has made in the field of drug testing, it is still an imperfect science and mistakes still occur. With regards to Hamilton's case:

The novel blood test used to condemn Hamilton as a cheater and suspend him for two years was developed by researchers in Sydney, Australia, on a \$50,000 USADA grant—that sum a fraction of what's normally spent in medicine to develop and validate a diagnostic test. "This test was not ready for prime time," says Carlo Brugnara, professor of pathology at Harvard Medical School. Brugnara was a member of the peer-review committee that approved publication of an article outlining the test in 2003. However, he felt so strongly that it was prematurely implemented in Hamilton's case that he volunteered to testify at an arbitration hearing for the cyclist in 2005.<sup>128</sup>

It is unfair for officials from WADA or any other investigation or arbitration service to make statements regarding the guilt or innocence of an individual before that individual has the chance to appeal their case to an arbitration panel.

Finally, athletes are not given a choice regarding whether or not to have their cases heard by an arbitration panel. Since the first 1996 Atlanta Games, any athlete who wishes to compete has to agree to binding arbitration in front of the ad hoc division for any appeal—whether the case is doping, eligibility, or any other issue.<sup>129</sup> Many critics, and even some proponents of the ad hoc division, predicted that athletes would refuse en masse to sign the agreement.<sup>130</sup> While this has not been the case, some have questioned the

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<sup>126</sup> Michael A. Hiltzlik, *Cyclist Blames 'Flawed' Test*, L.A. TIMES, Dec. 10, 2006, at A39.

<sup>127</sup> *Id.* When Hamilton competed a few weeks after the Olympics, he again turned in a positive test result and this time was convicted. The chairman of WADA, Richard W. Pound, announced to the media "[w]e got him on the second bounce"—indicating that Hamilton had also been guilty in Athens. *Id.* Whether or not Hamilton was indeed guilty of doping in Athens is far beyond the scope of this note, but the fact that Pound publicly announced Hamilton's guilt in Athens without a concurring test (at least one that conformed to WADA standards) is troubling.

<sup>128</sup> *Id.*

<sup>129</sup> See KAUFMANN-KOHLER, *supra* note 87, at 103.

<sup>130</sup> *Id.*

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appropriateness of requiring athletes to give up certain due process rights as a condition of competing in the Games.<sup>131</sup> As a corollary to this binding agreement, and in an effort to “reduce the risk of arbitrators being challenged” athletes are not allowed to choose the arbitrator for their case.<sup>132</sup> This means that athletes cannot suggest an arbitrator on their own, even if both parties would agree that a given arbitrator should hear the case.<sup>133</sup> For example, if there was a dispute over the nationality of an athlete, and thus his ability to compete for a certain nation, the parties would not be able to put the case before an arbitrator who was also an expert in the citizenship laws of the nation in question unless that individual was on the list of approved arbitrators.<sup>134</sup>

In summation, there are five procedural regulations that have raised the most controversy for the ad hoc division over the past decade: the application of strict liability theory without any other well-defined substantive law, the extremely limited time frame in which decisions must be made, the possibility of involuntary ex parte hearings, the possibility of some arbitrators making public statements regarding the guilt or innocence of athletes before a decision has been rendered, and the requirement that athletes agree to arbitration if they want to compete.<sup>135</sup>

### *B. Major League Baseball can Avoid the Criticisms Leveled at the Ad Hoc Division Through Careful Examination of its own Procedures*

MLB has already avoided some of the issues mentioned above through careful planning and adherence to an arbitration agreement. MLB and the Players Association have agreed to keep any and all information regarding a positive steroids test strictly confidential.<sup>136</sup> In fact, most of the public's knowledge of steroids disputes has arisen not from the League office itself, but from Congressional Hearings and the accounts of former stars like Jose

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<sup>131</sup> See Goldstone, *supra* note 86, at 373.

<sup>132</sup> See KAUFMANN-KOHLER, *supra* note 87, at 43.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> The lack of substantive law that athletes can expect to rely upon when going before the ad hoc division has also been a source of consternation. See Goldstone, *supra* note 86, at 388–91. Richard McLaren, one of the original members of the ad hoc division, has said that the court operates on the basis of “general principles of law and the rules of law, the application of which it deems appropriate.” See McLaren, *supra* note 114, at 521–23. This aspect, combined with the lack of appeals, effectively makes the ad hoc division the judge, jury, and appeals court.

<sup>136</sup> KAUFMANN-KOHLER, *supra* note 87, at 113.

Canseco and trainers like Brian MacNamee.<sup>137</sup> The League itself has never been accused of disseminating information to the press regarding steroids testing or making a public statement condemning a player before that player has had a chance to appeal his case before an arbitration panel.<sup>138</sup> This is a marked improvement from WADA's recent habit of publicly accusing athletes of wrongdoing before any sort of hearing has occurred. One procedure of the HPAC, however, could be deemed to be a public statement regarding guilt or innocence even without saying as much. When a player first turns in a positive steroids test, they are placed on either the "clinical" or "administrative" track.<sup>139</sup> This initial designation can also be understood as a quasi-declaration of a player's innocence or guilt. Clinical track athletes have the connotation of addicts who need treatment while administrative track athletes are seen as cheaters who deserve to be punished. This separation ignores the reality that most of the prohibited substances on Major League Baseball's list, including anabolic steroids, are highly addictive:

Physically, many athletes experience severe depression following cessation of the drug similar to that of any other drug addict. Psychologically, steroid use can be compulsive and unstoppable, in what has been termed by the medical community as "reverse anorexia." The steroid users have an uncontrollable obsession with being big instead of skinny. This obsession results in the continuing or increased usage of anabolic steroids.<sup>140</sup>

The immense consequences that the HPAC's distinction will have upon the player who has tested positive for a banned substance is all the more reason

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<sup>137</sup> Jose Canseco, a former major league star, might be credited with bringing the steroids controversy in baseball to a head when he published "Juiced: Wild Times, Rampant 'Roids, Smash Hits and How Baseball Got Big". Michael O'Keefe, *Canseco's Book Names Steroid Users*, ORLANDO SENTINEL, Feb. 7, 2005, at C1. In that book, Canseco claimed to have personally injected some of the league's biggest stars. *Id.* Brian MacNamee, a former trainer, made headlines when he named star pitcher Roger Clemens, among others, as abusers of performance-enhancing drugs in front of Congress. Lance Pugmire & Bill Shaikin, *Evidence Against Clemens Submitted*, THE STAR-LEDGER, Feb. 7, 2008, at 55.

<sup>138</sup> MLB Commissioner Bud Selig has expressed his faith in the ability of Senator Mitchell to deliver an unbiased report, but he has wisely refrained from commenting on the guilt or innocence of any player named in the report. See Statement of Commissioner Allan H. Selig Before the House Committee on Oversight and Government Reform, Jan. 15, 2008, available at <http://oversight.house.gov/documents/20080115114736.pdf>.

<sup>139</sup> See Joint Drug Agreement, *supra* note 64.

<sup>140</sup> Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L.J. 93, 107 (1990). Senator Mitchell notes in his report that, in some studies, individuals who are addicted to steroids exhibit identical symptoms to addicts of other harmful drugs. See Mitchell Report, *supra* note 1, at 8–9.



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to closely evaluate the fairness and balance of MLB's arbitration procedures as described above.

MLB also places severe time limitations upon an athlete who is considering whether or not to appeal his case any further than the "clinical" or "administrative" ruling of the HPAC and the punishment that the League hands down. The player who has been notified of his positive test result has only forty-eight hours to inform the HPAC whether or not he will challenge the positive test results.<sup>141</sup> Players who might want to check with their own medical examiner or a physician to see if anything they may have ingested would have caused a positive test result will have only forty-eight hours to complete their own investigation and decide whether or not to appeal their case before the arbitration panel. While the baseball season is not endless, it does not have nearly the kind of time constraints as an Olympiad.<sup>142</sup> In the case of Major League Baseball, the League should consider extending the time to consider whether or not to appeal a positive steroids test to a week or even longer. This will allow players who may not be sure about whether or not they have a tenable defense to conduct an investigation on their own if they wish to do so.<sup>143</sup>

### IV. THE DIVISION OF THE HPAC FROM MLB'S STANDARD ARBITRATION PANELS

Another issue facing MLB is the practice of divorcing the decisions of the institution most familiar with the League's substance abuse policies and procedures—the HPAC—from the institution that will make the final decision regarding a player's guilt or innocence in a substance-abuse hearing. The HPAC's influence ends at the point where a player has turned in a positive substance-abuse test.<sup>144</sup> From this point forward, the claim will be handled by MLB's standard arbitration office—the same office that regularly deals with salary disputes.<sup>145</sup> The selection of arbitrators at this level, however, is different from that of the HPAC:

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<sup>141</sup> Joint Drug Agreement, *supra* note 64, at 12.

<sup>142</sup> Major League Baseball's 2009 season will consist of 162 regular season games—not including preseason or the playoffs. See Major League Baseball 2009 Schedule, available at <http://mlb.mlb.com/mlb/schedule/#20090705>. The season will start March 30 and stretch though October. *Id.*

<sup>143</sup> If this situation seems far-fetched, keep in mind the circumstance of Andrea Raducan, the Romanian gymnast. See *supra* note 103 and accompanying text.

<sup>144</sup> See Joint Drug Agreement, *supra* note 64. Thus far, this has not been an issue since only one player has taken his case past the HPAC to league's arbitration office.

<sup>145</sup> *Id.*

Typically, labor and management use the services of the private, nonprofit American Arbitration Association (AAA) or the public Federal Mediation and Conciliation Service (FMCS). Both “appointing agencies maintain rosters of acceptable arbitrators, persons with extensive experience in labor relations who are neutral on labor-management issues. On request, the parties receive a list of seven arbitrators in their region. The parties strike the names of unacceptable candidates in turn, leaving the remaining person as their selected neutral.”<sup>146</sup>

It should be noted that the League’s standard arbitration practice deals overwhelmingly with salary dispute arbitration over the course of a given season.<sup>147</sup> Their expertise in matters of substance-abuse disputes is thus relatively limited. The HPAC is not required to, and there is no indication that the League would require that institution to, testify at any arbitration panel hearing. It seems odd that the party with the most expertise in a given subject matter, which is also the party that has dealt with the player and testing administrators up until this point, would not be included in the actual arbitration hearing itself. The arbitration panel itself is thus at a disadvantage because it cannot rely upon the expertise and wisdom of the HPAC—both in dealing with substance abuse disputes in general and in the specific case at bar.

## V. CONCLUSION

Many of the problems and criticisms that have been raised with regards to the IOC’s arbitration system for substance abuse are not an issue for MLB because of the differences between the two institutions, or are not a problem because of the ways in which MLB’s arbitration procedure differs from that of the IOC. So far, MLB has not faced much in the way of criticisms regarding its own substance abuse arbitration structure. This is perhaps not surprising, considering how few players have actually chosen to go through the arbitration process.<sup>148</sup> However, the lack of a pre-existing controversy should not prevent MLB from examining and reformulating its procedures so as to solve problems before they happen:

Many contracts now address possible future disputes by specifying the resolution procedure. Some forward-looking organizations have begun

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<sup>146</sup> ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 120–21 (1998). Abrams also notes that although thousands of arbitrators are maintained on both the AAA and FMCS lists, in practice only about sixty of the most senior arbitrators, usually trained in law or economics, will handle such a dispute. *Id.* at 121.

<sup>147</sup> *See id.* at 121–22.

<sup>148</sup> *See Barker, supra* note 76, at 1A.

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designing dispute resolution systems that recognize the inevitability of conflict and the possibility of productive resolution. Most of these approaches require the application of problem-solving and facilitation skills similar to those used in mediation. Persistent, unresolved conflict is expensive in many ways. When disputes are recognized early, more options exist for constructive resolution efforts. Further, the efforts have a greater chance for lower cost and successful outcomes. The trend is clearly toward early recognition of conflict and either proactive anticipatory efforts or early intervention. ADR processes and skills provide helpful options.<sup>149</sup>

Considering the unique nature of substance abuse cases before arbitration bodies, and the already-existing HPAC that has extensive medical knowledge regarding such abuses, the League should establish a new, independent wing of the standard arbitration office that will be tasked with exclusive jurisdiction over substance abuse disputes in MLB. To this point, MLB has let the United States Congress do much of the work for it as far as hearings and tribunals are concerned. If the League administration is serious about cracking down on the substance abuse problem that pervades the current atmosphere of the League, then it must be prepared to accept responsibility and arbitrate the cases themselves in a way that will ensure fairness. This new arbitration body should also consider what procedural rules and regulations will apply in its handling of cases, keeping in mind the tribulations of the IOC and its ad hoc division so as to avoid the same criticisms.

The effect of the Mitchell Report on the atmosphere of baseball is not fully certain yet—the season has not yet started and many active players named in the report have not been disciplined yet by the League. The fact that no player named in the Mitchell Report has been brought before a disciplinary review board of MLB yet may mean that baseball is hoping the Report alone was enough to clean up the game.<sup>150</sup> What the report does make clear is that MLB players feel unfairly targeted by the League's efforts in investigating and punishing substance abuse. This atmosphere of distrust and

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<sup>149</sup> Steve Mains, *Alternative Dispute Resolution: What's Next?*, 26 COLO. LAW. 53, 54 (1997); see also Kimberlee K. Kovach, *The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice*, 7 CARDOZO J. CONFLICT RESOL. 27, 73 (2005) ("Rather than react to what has happened, the mediation community must realize that change is probable and take a proactive role in the redesign of mediation and additional processes.").

<sup>150</sup> As of March 13, 2008, none of the players listed in the Mitchell Report have been questioned by MLB authorities since Cleveland Indians pitcher Paul Byrd was questioned on December 17, 2007. Baseball Notebook, *Report Gets Slow Response*, BOSTON GLOBE, Mar. 13, 2008, available at [http://www.boston.com/sports/baseball/articles/2008/03/13/report\\_gets\\_slow\\_response/](http://www.boston.com/sports/baseball/articles/2008/03/13/report_gets_slow_response/).

hostility between the League office and the Players Association will surely be at the fore of any substance abuse arbitration in the future. The structure of these proceedings can thus greatly impact the ways in which both parties perceive the fairness of the outcome. Most strikes in the history of MLB have evolved from some disagreement as to basic fairness between the League office and the players—whether it is a dispute on salaries, free agency, or any other aspect of the business of baseball.<sup>151</sup> Given the distrust and ill feelings towards the game that fans and the media already feel, it is imperative that MLB avoid a situation that would give players reason to strike. MLB should amend its substance abuse arbitration procedure now or risk the same problems faced by the International Olympic Committee.

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<sup>151</sup> See Paul Staudohar, *The Baseball Strike of 1994-95*, 120 MONTHLY LAB. REV. 21, 21–26 (1996). Since 1966, there have been five strikes initiated by the Players Association. See Major League Baseball Players Association: Frequently Asked Questions, <http://mlbplayers.mlb.com/pa/info/faq.jsp#1966> (last visited August 5, 2009). The owners have also locked out the players, effectively stopping the season, since that time. *Id.*